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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 939

THE FERBER COMPANY *et al.*,
PETITIONERS,

v.

THEODORE J. ONDRICK *et al.*,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT THEODORE J. ONDRICK'S BRIEF IN OPPOSITION

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RULE CITED

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The Proceedings Below

This is a bill of interpleader brought in the United States District Court for the District of Massachusetts by the petitioners, who are joint venturers, hereinafter collectively called Ferber. Ferber deposited $46,507.83 into the court registry, alleging that such was a final payment due on a written contract between it on the one hand, and Respondents Theodore J. Ondrick and Wilbraham Construction Corp., who were joint venturers, hereinafter collectively

called Wilbraham (R. 7, 8.) on the other.[1] Ferber also alleged that the respondent Theodore J. Ondrick, hereinafter called Ondrick, had made a personal claim against the petitioners for $19,744.42 on account of certain work performed (R. 10). The petitioners then prayed for a discharge "*from all liabilities in the premises. . .*" (R. 12.)

Ondrick, in so much of his answer which is here now material, admitted that he had so made a claim of $19,744.42, alleging that such work was not performed pursuant to the joint venture contract between Ferber and Wilbraham (R. 17.) Ondrick, also, filed a counterclaim against Ferber, of which only Count I remains relevant. In it, Ondrick alleged that Ferber requested him to perform certain construction work; that he performed such work; that such work was outside the scope of the joint venture contract referred to in Ferber's bill and was extra work performed by Ondrick as an individual at the request of Ferber; that Ferber had not paid Ondrick for such work; and that Ferber owed him $19,744.42 for such. (R. 18, 19.) Ferber filed a motion to dismiss this counterclaim. It was denied. (R. 20, 21.)

In its answer to Ondrick's counterclaim, Ferber alleged as an affirmative defense Ondrick's failure to arbitrate in accordance with the terms of the said joint venture contract. (R. 23, 24.)

Ondrick's counterclaim was tried in the district court below. He was awarded judgment in the amount of $10,711.20. (R. 204.) On appeal below, the award was set aside on grounds not material here. The district court's denial of Ferber's motion to dismiss Ondrick's counterclaim, however, was affirmed.

Ferber now seeks a review of this determination.

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[1] Respondent Peerless Insurance Company has been a party through the proceedings below, but it is doubtful that it is a party here or has an interest in the present petition.

Facts

Ferber was the prime contractor on a government contract. (R. 26, 27.) Wilbraham was a subcontractor under Ferber. (R. 29, 30, 170.) The contract between such contained an arbitration clause. (R. 171.) During the performance of that contract, a dispute arose between Ondrick and Ferber over whether certain work was within or without the Ferber-Wilbraham contract. (R. 51, 53; R. 105.) In order to keep Ondrick performing the disputed work, Ferber made numerous threats to Ondrick. (R. 54; R. 151, 152.) Subsequently, Ferber called in Ondrick's bonding company (R. 54.) The bonding company conferred with Ondrick. (R. 54.) Thereafter, Ondrick completed the disputed work under protest (R. 55.)

Question Presented

Did a bill of interpleader which purported to concern only a final payment on a written contract, but which in fact contained allegations with respect to a disputed claim for work performed outside the scope of such written contract, and which also prayed for a discharge "*from all liabilities in the premises*" act as a waiver of an arbitration clause contained in the said written contract?

Reasons for Denying the Writ

The question is neither novel nor weighty. The petitioners mistakenly believe that the decision of the circuit court below has brought Federal Rule 22 into conflict with an arbitration clause contained in the joint-venture contract between Ferber and Wilbraham (See p. 6 of the petition). Obviously, such is not the case. The circuit court

below has ruled only that the allegation concerning Ondrick's individual claim, together with the prayer for a discharge from all liability contained in the petitioners' bill, acted as a waiver of the arbitration clause involved. The waiver is based on the intent of the petitioners' pleading and not on Federal Rule 22.

The Ferber Company v. *Theodore J. Ondrick*, 310 F.2d 462, and authorities cited.

Thus, the petition for a writ of certiorari is based on a misconception of the circuit court opinion below.

Conclusion

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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